Supreme Court, U.S.
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No. 08-478

IN THE

Supreme Court of the United States

CRAIG OUTDOOR ADVERTISING, INC., CURTIS MASSOOD, MIDWEST OUTDOOR MEDIA, LLC, AND PATRIOT OUTDOOR, LLC,

Petitioners,

v.

VIACOM OUTDOOR INC., WALLY KELLY, AND HAROLD GUSTIN,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT VIACOM OUTDOOR INC.'S BRIEF IN OPPOSITION

SYDNEY MCDOLE
JONES DAY
2727 N. Harwood Street
Dallas, TX 75201-1515
(214) 220-3939 (phone)
(214) 969-5100 (fax)

GLEN D. NAGER
Counsel of Record
ZACHARY S. PRICE
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001-2113
(202) 879-3939 (phone)
(202) 626-1700 (fax)

Counsel for Respondent Viacom Outdoor Inc.

December 12, 2008

QUESTIONS PRESENTED

1. Whether the Eighth Circuit correctly applied the settled common-purpose requirement of a RICO enterprise in holding that parties to an agreement do not share a common purpose where one party uses the agreement to advance its own interests at the expense of the other party's interests.

2. Whether the Eighth Circuit correctly applied the settled "continuity" requirement of a "pattern of racketeering activity" under RICO in holding that there was no "open-ended" continuity where disclosures by the defendants terminated the alleged fraud-by-omission.

3. Whether, in dismissing claims by a former shareholder based on injuries to the corporation, the Eighth Circuit correctly applied the settled rule that shareholders lack standing to recover individually for corporate damages.

CORPORATE DISCLOSURE STATEMENT

1. Respondent Viacom Outdoor Inc. has changed its name to CBS Outdoor Inc. as a result of the corporate reorganization of its parent company.

2. CBS Radio Media Corporation f/k/a Infinity Media Corporation owns 100% of the stock of CBS Outdoor Inc. f/k/a Viacom Outdoor Inc.

3. CBS Radio Inc. f/k/a Infinity Broadcasting Corporation owns 100% of the stock of CBS Radio Media Corporation f/k/a Infinity Media Corporation.

4. CBS Broadcasting Inc. owns 100% of the stock of CBS Radio Inc. f/k/a Infinity Broadcasting Corporation.

5. Westinghouse CBS Holding Company, Inc. owns 100% of the stock of CBS Broadcasting Inc.

6. CBS Corporation, a publicly-traded company, owns 100% of the stock of Westinghouse CBS Holding Company, Inc.

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RESPONDENT VIACOM OUTDOOR INC.'S BRIEF IN OPPOSITION

INTRODUCTION

Respondent Viacom Outdoor Inc. ("Viacom") (now known as CBS Outdoor Inc.), a company that owns and operates outdoor advertising billboards, holds exclusive rights to billboard advertising sites on the property of three railroads. In the proceedings below, petitioners Craig Outdoor Advertising, Inc. ("Craig Outdoor"), Midwest Outdoor Media, LLC ("Midwest Outdoor"), Patriot Outdoor, LLC ("Patriot Outdoor"), and Curtis Massood alleged that Viacom and several Viacom employees, including respondents Wally Kelly and Harold Gustin, violated Connecticut and Missouri law and the civil-remedy provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-68, by denying petitioners' applications for potential billboard advertising sites on railroad property because of an internal determination that licensing the sites would not be in Viacom's best interests.

The United States District Court for the Western District of Missouri dismissed the RICO claims against Viacom on the ground that record evidence failed to establish the essential "enterprise" element of these RICO claims. Pet. App. 53a-55a. The district court also dismissed the claims by petitioner Massood on the ground that he lacked standing because his claims properly belonged not to Massood personally, but to a corporation that he had sold. *Id.* at 35a, 62a-66a. At trial, petitioners dropped their state claims against the employee defendants, pursuing only the remaining RICO claims against them and the state claims against Viacom. Trial Tr.

2155, 2169-81. A jury entered a defense verdict for two employee defendants, *see* Jury Verdict as to RICO, *Craig Outdoor Adver., Inc. v. Viacom Outdoor Inc.*, No. 04-0074-CV-W-DW (W.D. Mo. July 26, 2005), but found in petitioners' favor on the remaining claims against respondents. Pet. App. 4a.

The Eighth Circuit affirmed in part and reversed in part. *Id.* at 47a. As relevant here, the court: (1) affirmed the dismissal of the RICO claims against Viacom; (2) affirmed the dismissal of Massood's claims; and (3) reversed the judgment on the RICO claims against Kelly and Gustin because the evidence failed to establish the "continuity" requirement of the "pattern of racketeering activity" alleged as an essential element of these claims. *Id.* at 38a, 40a-45a, 47a. Although petitioners seek a writ of certiorari as to these three holdings, the Eighth Circuit's rulings on these points reflect the sound application of well-established legal principles to the particular facts of this case. Accordingly, this case presents no issue worthy of this Court's review.

STATEMENT OF THE CASE

1. Petitioners' claims relate to management agreements initially entered into by Outdoor Systems, Inc. ("Outdoor"), a billboard company, with the Burlington Northern & Santa Fe Railway Company ("BNSF"), and by Transportation Displays, Inc. ("TDI"), a firm focused on licensing advertising sites, with the Kansas City Southern Railway Company ("KCS") and Guilford Transportation Industries, Inc. ("Guilford"), the parent company of the Boston & Maine Railroad ("B&M"). Trial Tr. 779, 876-77, 1036-37; Pls.' Exs. 238, 239, 243, Compendium of Trial Exs. ("TrialEx") at 1019-59,

1229-1309, Trial Tr. 59, 539, 1325-26 (admitting exhibits); Second Am. Compl. ¶ 1. Under these management agreements—for which Outdoor and TDI paid millions of dollars in consideration—Outdoor and TDI held exclusive rights to develop or license billboard advertising sites on rights-of-way owned by the three railroads, subject only to the railroads' approval or disapproval on specified grounds. *See* Pls.' Exs. 238, 239, 243, TrialEx at 1023-27, 1044-47, 1238-41. Outdoor's agreement with BNSF obligated the railroad to transfer easements to Outdoor for all licensed sites. Pls.' Ex. 243, TrialEx at 1240-41.

a. Petitioner Curtis Massood alleges that, in January 1998, he contacted Outdoor about several potential billboard sites on BNSF property and was told that Outdoor approved site applications on a "first-come, first-served" basis. Pet. 28; Trial Tr. 1582-85; Second Am. Compl. ¶ 43. Massood applied for the sites on behalf of his billboard company, Wilson-Curtis, Inc. ("Wilson-Curtis"), but Outdoor denied the applications. Pet. 25-26, 28; Pet. App. 35a; Trial Tr. 1585, 1640-41. Massood alleges that Outdoor denied the applications so as to retain the sites for itself. Pet. 26, 28.

Less than a year after the denial of Wilson-Curtis's applications, and despite having discussed the denials with legal counsel, Massood and his partner sold Wilson-Curtis, along with certain billboard sites personally owned by Massood, to Outdoor for $4.2 million. Pet. App. 35a; Trial Tr. 1599, 1648-52. A year after that, in 2000, Massood brought suit in Missouri state court alleging claims based on the denial of his 1998 applications. Pet. App. 66a n.1;

Trial Tr. 1607-08, 1648-49. Those claims were dismissed for lack of standing on the ground that the claims properly belonged not to Massood personally, but to Wilson-Curtis, the corporation that Massood and his partner had sold. Pet. App. 66a n.1; Trial Tr. 1607-08.

b. Through a series of corporate transactions during the late 1990's and 2000-2001, TDI and Outdoor merged into a single business that became Viacom in early 2001. Br. of Appellant Viacom at 8-9, 16-17, *Craig Outdoor Adver., Inc. v. Viacom Outdoor Inc.*, 528 F.3d 1001 (8th Cir. 2008) (No. 06-3337); Trial Tr. 778-79, 1329-30, 1379-82. Viacom thus became the exclusive licensor for billboard sites on BNSF, KCS, and B&M property. Br. of Appellant Viacom at 17; Trial Tr. 539-40, 778-81. Respondent Kelly, who had previously been with Outdoor, became President and CEO of Viacom. Trial Tr. 1327, 1329. Kelly had not been involved in Outdoor's licensing of railroad billboard sites. *Id.* at 1400-02.

In late January 2002, respondent Kelly announced at a meeting of the newly-formed Viacom "landlease" group that Viacom should review license applications for billboard sites on railroad property to determine whether granting the applications was in Viacom's best interests. *Id.* at 1380, 1385-90. Petitioners Craig Outdoor, Midwest Outdoor, and Patriot Outdoor allege that they (or their predecessors) submitted applications for proposed sites in reliance on the belief that Viacom would grant billboard licenses on a "first-come, first-served" basis. These petitioners allege that Viacom denied their applications as a result of its internal review process. Pet. App. 8a-12a.

c. Starting in January 2003, Viacom sent all applicants a letter indicating that Viacom would review all applications for billboard licenses and rule on each application in its "sole discretion." *Id.* at 44a-45a, 72a-73a.

2. In January 2004, petitioners sued respondents Viacom, Kelly, and Gustin, as well as two other Viacom employees, in the United States District Court for the Western District of Missouri. *See* Compl. Alleging that Viacom had defrauded them by failing to disclose that Viacom would review their applications for its own purposes rather than grant them on a first-come, first-served basis, petitioners asserted claims under Missouri and Connecticut law as well as civil RICO. Pet. App. 3a-4a.

Before trial, the district court dismissed all claims by petitioner Massood and the RICO claims against Viacom. Pet. App. 54a-55a, 63a. Like the Missouri court in Massood's earlier suit, the district court held that Massood lacked standing to pursue his claims based on the denial of the 1998 Wilson-Curtis applications, because those claims properly belonged to the corporation, Wilson-Curtis, not to Massood. *Id.* at 63a-65a. As to the RICO claims against Viacom, the court held that petitioners failed to establish the essential "enterprise" element of a RICO claim. *Id.* at 53a-55a. While petitioners alleged that Viacom formed an "association-in-fact" enterprise with each of the three railroads, the court deemed these allegations insufficient as a matter of law because the railroads included in the alleged enterprises were "innocent" parties, not participants in the alleged fraud. *Id.* The members of an association-in-fact enterprise, the court held, "'must share a common

purpose to engage in a particular fraudulent course of conduct and work together to achieve such purposes.'" *Id.* at 54a (quoting *Blue Cross of Cal. v. SmithKline Beecham Clinical Labs., Inc.*, 62 F. Supp. 2d 544, 551 (D. Conn. 1998)). Hence, "an association-in-fact enterprise cannot consist of innocent participants." *Id.*

At trial, petitioners decided not to pursue their state claims against the employee defendants. Trial Tr. 2155, 2169-81. The jury rejected petitioners' claims against two employee defendants, *see* Jury Verdict as to RICO, but found in petitioners' favor on their remaining common-law claims against Viacom and RICO claims against Kelly and Gustin. Pet. App. 3a-4a, 67a-68a.

3. Both petitioners and respondents appealed from the district court's judgment. In a thorough opinion addressing numerous issues, the Eighth Circuit affirmed in part and reversed in part. Three of the court's holdings are implicated by the petition here.

First, the Eighth Circuit affirmed on alternative grounds the district court's rejection of the RICO claims against Viacom. Although the district court had concluded that the alleged association-in-fact enterprises comprised of Viacom and the three railroads lacked any common fraudulent purpose because the railroads were "innocent participants," Pet. App. 54a, the Eighth Circuit held that these alleged associations in fact lacked any "common purpose of any kind—fraudulent or otherwise." *Id.* at 39a. As the Eighth Circuit explained, "[b]y Plaintiffs' own account," Viacom and the railroads were working at cross-purposes: while the railroads aimed to lease

their property as profitably as possible, Viacom allegedly "was operating strictly in its own best interests, appropriating billboard sites and delaying site applications when circumstances dictated that such action would benefit Viacom." *Id.* at 41a. Accordingly, the Eighth Circuit found the record evidence insufficient to establish the essential "common purpose" requirement of an association-in-fact RICO enterprise. *Id.* at 40a-41a.

Second, the Eighth Circuit also deemed the record evidence insufficient to establish the RICO claims against Kelly and Gustin. As the Eighth Circuit explained:

> Plaintiffs' RICO theory is that Kelly and Gustin, individually, through the use of the mails and wires, devised and perpetrated a scheme by which Viacom would profess to follow a first-come, first-served procedure—thereby fraudulently inducing Plaintiffs to submit applications—but would secretly review railroad billboard site applications with the goal of appropriating desired sites for its own use. In other words, the culpable act was using the mails and wires to conceal or misrepresent the review process; it was not the review process itself.

Id. at 44a. The letter transmitted to all applicants beginning in January 2003, however, informed applicants that Viacom would review billboard site applications and grant them in Viacom's "sole discretion." *Id.* at 44a-45a, 73a. Because this letter necessarily terminated any alleged fraudulent scheme based on representations that licenses would be granted on a first-come, first-served basis, the Eighth Circuit held that record evidence failed to

establish the "continuity" requirement of a "pattern of racketeering activity," another necessary element of petitioners' RICO claims. *Id.* at 43a, 45a.

Finally, the Eighth Circuit affirmed the dismissal of petitioner Massood's claims. Like the district court and the Missouri state court, the Eighth Circuit concluded that "[a] shareholder generally may not sue on his own behalf—under Missouri law or RICO—to recover the wrongful diminution in value of his stock or to recoup his share of money taken from the corporation; such claims must generally be pursued in a shareholders derivative action." *Id.* at 35a (citing cases). While Massood urged the court to recognize an equitable exception to this general rule, the Eighth Circuit declined to do so, noting that other courts had likewise "refused to extend a derivative-standing exception" in "analogous situations." *Id.* at 37a.

REASONS FOR DENYING THE WRIT

This Court will expend its limited resources to consider a case on the merits only when there are "compelling reasons" for doing so, such as a conflict on "an important federal question" between lower courts or between the holding of the court below and the decisions of this Court. Sup. Ct. R. 10. A case is not suitable for review when the issue on which review is sought is narrowly fact-bound, *see, e.g.*, *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955), or when the petition seeks mere error-correction with respect to an alleged misapplication of settled law, *see* Sup. Ct. R. 10; *Gonzalez v. Crosby*, 545 U.S. 524, 544 n.7 (2005) (Stevens, J., dissenting); *Overton v. Ohio*, 534 U.S. 982, 985 (2001) (Breyer, J., dissenting from denial of certiorari). A "genuine

conflict" in authority meriting this Court's review arises only "when it may be said with confidence that two courts have decided the same legal issue in opposite ways, based on their holdings in different cases with very similar facts." Eugene Gressman et al., *Supreme Court Practice* § 4.3, at 242 (9th ed. 2007).

This case does not qualify for review under these standards. In rejecting petitioners' RICO claims against Viacom, reversing the RICO judgments against Kelly and Gustin, and holding that petitioner Massood lacked standing to pursue his claims, the Eighth Circuit correctly applied settled legal principles to the particular facts of this case, creating neither any new principle of law nor any conflict with decisions of other courts.

I. THE EIGHTH CIRCUIT'S REJECTION OF THE RICO CLAIMS AGAINST VIACOM IS NOT WORTHY OF REVIEW

A. The Eighth Circuit Correctly Held That Petitioners Failed To Establish the "Common Purpose" Requirement of Their RICO Claims

In affirming the district court's award of summary judgment in Viacom's favor on petitioners' RICO claims against Viacom, the Eighth Circuit correctly determined that the record evidence in this case was legally insufficient to satisfy the essential "enterprise" element of a RICO claim. Such a fact-bound—and legally correct—determination is plainly not worthy of this Court's review.

RICO section 1962(c) prohibits "conduct[ing] or participat[ing], directly or indirectly, in the conduct of [an] enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

18 U.S.C. § 1962(c); *see also id.* § 1962(d) (prohibiting conspiracy to violate § 1962(c)); *id.* § 1964(c) (establishing cause of action for damages based on violations of § 1962). The statute defines the key term "enterprise" in this provision to "include[] any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." *Id.* § 1961(4). Under decades-old precedent of this Court, a group may constitute an "association-in-fact" enterprise under the statute only if its members (1) "associated together for a common purpose of engaging in a course of conduct," (2) formed "an ongoing organization, formal or informal," and (3) "function[ed] as a continuing unit." *United States v. Turkette*, 452 U.S. 576, 583 (1981). Here, petitioners alleged that Viacom formed an association-in-fact enterprise with each of the railroads with which it had licensing agreements. But, applying *Turkette* to the facts of this case, the Eighth Circuit correctly recognized that no record evidence established the first *Turkette* requirement, i.e., common purpose. Pet. App. 41a.

As the Eighth Circuit put it, on the particular facts of this case, "Plaintiffs have failed to establish that the alleged association-in-fact enterprises shared a common purpose of any kind—fraudulent or otherwise." *Id.* at 39a. Indeed, far from sharing a common purpose, the railroads—according to petitioners' own allegations—were "victim[s]" of Viacom's alleged scheme: while the railroads contracted with Viacom to license advertising sites for the railroads' benefit, plaintiffs maintained that Viacom in fact used its licensing rights to benefit itself at the railroads' expense. Second Am. Compl.

¶¶ 162-64, 206-08. In other words, "[b]y Plaintiffs' own account, Viacom was operating strictly in its own best interests, appropriating billboard sites and delaying site applications when circumstances dictated that such action would benefit Viacom." Pet. App. 41a.

In so finding, the Eighth Circuit identified numerous inconsistencies between the allegation of common purpose and the facts petitioners alleged.

First, "Plaintiffs described several instances in which Viacom's conduct resulted in sites being 'spaced out' by billboards erected on neighboring property, thus preventing the affected railroad from ever benefiting from a billboard located on its property." *Id.* ("Spacing out" is an industry term-of-art referring to the placement of a neighboring billboard too close to permit use of the proposed site under applicable billboard spacing laws. *Id.* at 48a n.3; Trial Tr. 231-32.) This alleged conduct could serve Viacom's interest in limiting competition at the expense of the railroads' interest in profitably leasing their property. Hence, "[i]t is unlikely that the railroads would cooperate with Viacom to achieve this goal." Pet. App. 41a.

Second, "Plaintiffs . . . described how Viacom hoped to discourage site applicants who intended to resell their billboards or licenses for what Viacom believed were undeserved profits." *Id.* Again, these alleged actions could serve Viacom's interest in preventing "undeserved" profits for competitors, not the railroads' interest in leasing their property to whoever would pay for it. As the Eighth Circuit explained: "We cannot conceive how this goal was shared by any of the railroads, which presumably did

not care who held the license for a particular billboard site as long as fees were paid." *Id.*

Finally, "Plaintiffs also alleged that Viacom operated these RICO enterprises with a goal of eliminating competition in its billboard markets"—yet another objective that could benefit Viacom but not the railroads, "since competition for billboard sites on railroad property would presumably be in the railroads' best interests." *Id.* "In short," the Eighth Circuit summed up, "the Plaintiffs failed to allege sufficient facts to demonstrate Viacom and each of the three railroads had a 'common purpose of engaging in a course of conduct.'" *Id.* (quoting *Turkette*, 452 U.S. at 583).

Given petitioners' overall theory of the case and the unique fact-pattern here, the Eighth Circuit's conclusion that, on the particular facts of this case, Viacom and the railroads lacked the requisite "common purpose" under RICO was manifestly correct. In cases in which a common purpose among enterprise members is similarly lacking, courts have routinely rejected RICO claims. *See, e.g.*, *In re Lupron Mktg. & Sales Practices Litig.*, 295 F. Supp. 2d 148, 173 (D. Mass. 2003) (finding no common purpose in the sense of "coordinated activity in pursuit of a common objective"); *Blue Cross*, 62 F. Supp. 2d at 553 (rejecting enterprise allegations where alleged participants "lack not only a common *fraudulent* purpose, but any common purpose at all"); *First Nationwide Bank, FSB v. Gelt Funding, Corp.*, 820 F. Supp. 89, 98 (S.D.N.Y. 1993) (rejecting mortgage-fraud enterprise allegations where each borrower included in the alleged enterprise "acted on a particular occasion to benefit himself or herself and

not to assist any other borrower"), *aff'd*, 27 F.3d 763 (2d Cir. 1994).

Furthermore, even were the Eighth Circuit's enterprise holding debatable—which it is not—petitioners' RICO claims against Viacom would fail in any event because petitioners presented legally insufficient evidence of a "pattern of racketeering activity," another essential RICO element. *See infra* at 22-25. For this very reason, the Eighth Circuit rejected RICO claims against the individual defendants, Kelly and Gustin. Pet. App. 45a. This holding, as explained below, is not only entirely correct on the facts of this case but also completely unworthy of this Court's review. *See infra* at 22-25. Because the same predicate acts are alleged in the counts against Viacom as in the counts against Kelly and Gustin, *see* Second Am. Compl. ¶¶ 148-52, the Eighth Circuit's pattern holding applies equally to the RICO claims against Viacom, thus providing a fully adequate alternative justification for the dismissal of these claims.

In sum, in affirming the rejection of petitioners' RICO claims against Viacom, the Eighth Circuit simply applied *Turkette*'s common purpose requirement to the facts of this case and reached a correct result consistent with the decisions of other courts. In addition, the Eighth Circuit's equally correct—and equally fact-bound—holding that petitioners presented insufficient evidence of a RICO pattern supports dismissal of these claims. There is plainly no "compelling reason[]" for this Court to review the Eighth Circuit's fact-bound application of settled law to these claims. Sup. Ct. R. 10.

Nor is there any reason to hold this case for *Boyle v. United States*, 129 S. Ct. 29 (2008) (granting certiorari) (No. 07-1309). The question presented in that case—whether "proof of an association-in-fact under [RICO] require[s] at least some showing of an ascertainable structure beyond that inherent in the pattern of racketeering activity in which it engages," Pet. for Writ of Cert. at i, *Boyle*, 129 S. Ct. 29 (No. 07-1309)—is not presented here, and the Eighth Circuit's holdings provide an independent basis for rejecting petitioners' RICO claims against Viacom, regardless of the outcome in *Boyle*.

B. Petitioners' Arguments for Review of This Issue Are Meritless

1. Petitioners Mischaracterize the Eighth Circuit's Holding

Endeavoring to make this issue appear worthy of certiorari when it is not, petitioners repeatedly misstate the Eighth Circuit's holding, claiming that the court held that "members of an association-in-fact enterprise cannot have 'divergent goals.'" Pet. 7; *see also id.* at 9, 10, 13. According to petitioners, this putative holding establishes a "new requirement," *id.* at 9; petitioners thus accuse the Eighth Circuit of "narrowing" RICO, *id.*, "'rewrit[ing]'" the statute, *id.* at 10 (quoting *Bridge v. Phoenix Bond & Indem. Co.*, 128 S. Ct. 2131, 2145 (2008)), and defying this Court's precedent, *id.* at 8-10. In fact, petitioners are rewriting the Eighth Circuit's decision.

The Eighth Circuit concluded only that there was *no* legally cognizable common purpose on the facts of this case, not that there was some common purpose but also divergent purposes that prevented the alleged associations in fact from forming an

"enterprise." Indeed, the court could not have been more explicit on this point. While the district court dismissed the RICO claims against Viacom on the ground that Viacom and the railroads shared no common *fraudulent* purpose, because the enterprise included "innocent participants," Pet. App. 54a, the Eighth Circuit avoided that issue by holding that "Plaintiffs have failed to establish that the alleged association-in-fact enterprises *shared a common purpose of any kind—fraudulent or otherwise*." *Id.* at 39a (emphasis added).

To be sure, the Eighth Circuit at one point commented that "'divergent goals' among members of a purported association-in-fact enterprise is a 'fatal problem' to a RICO claim." *Id.* at 41a (quoting *Baker v. IBP, Inc.*, 357 F.3d 685, 691 (7th Cir. 2004)). But petitioners grossly misconstrue this statement in claiming that the Eighth Circuit rejected petitioners' enterprise theory because of "divergent" purposes even though some common purpose existed. In context, it is clear that the Eighth Circuit viewed the purposes here as *entirely* divergent. As the court explained in the sentence immediately preceding the challenged statement: "the Plaintiffs failed to allege sufficient facts to demonstrate Viacom and each of the three railroads had a 'common purpose of engaging in a course of conduct.'" *Id.* (quoting *Turkette*, 452 U.S. at 583).

Petitioners' fulminations about the Eighth Circuit's "rewriting" of the statute and departure from precedent are predicated on an entirely false depiction of the Eighth Circuit's decision. Far from inventing novel requirements, the Eighth Circuit simply applied the settled "common purpose"

requirement of *Turkette* and properly concluded that no common purpose could be found on the facts of this case.

2. The Common Purpose Identified by Petitioners Is Not Supported by the Record and Was Properly Rejected by the Eighth Circuit

To buttress their inaccurate assertion that the Eighth Circuit rejected their enterprise theory despite the existence of a common purpose, petitioners claim that the record in fact established a common purpose of "leasing property owned by the railroads to outdoor billboard businesses." Pet. 16. Yet the Eighth Circuit expressly—and properly—held that, as a matter of law, the evidentiary record did not establish this claimed common purpose.

Directly addressing petitioners' proposed common purpose, the Eighth Circuit stated: "We disagree with this characterization. Viacom's purposes and the railroads' purposes were not sufficiently aligned under the facts of this case to prove the existence of a RICO enterprise." Pet. App. 40a-41a. The Eighth Circuit went on to explain, using the examples discussed above of "spacing out" proposed sites, discouraging reseller applicants, and eliminating competition, *see supra* at 11-12, that Viacom and the railroads did not in fact share the goal of leasing railroad-owned property. Pet. App. 41a. Viacom, according to petitioners' own allegations, advanced its own interests in monopolizing billboard sites and eradicating competition at the expense of the railroads' interest in leasing their property as profitably as possible. *Id.*

The Eighth Circuit's holding on this point reflects a straightforward application of the "common purpose" requirement to particular facts. It does not present any "compelling reason[]" for this Court's review. Sup. Ct. R. 10.

3. Petitioners Identify No Legitimate Split in Judicial Authority

Petitioners also claim that the Eighth Circuit's decision conflicts with two other circuit decisions: *Williams v. Mohawk Industries, Inc.*, 465 F.3d 1277 (11th Cir. 2006), and *United States v. Orena*, 32 F.3d 704 (2d Cir. 1994). But the alleged conflicts are illusory. *Mohawk* and *Orena* are not cases "decid[ing] the same legal issue in opposite ways, based on . . . very similar facts," as required to justify expenditure of this Court's limited resources for review. Gressman, *supra*, § 4.3, at 242. These cases are in fact entirely distinguishable.

a. The Eighth Circuit's Decision Does Not Conflict with *Mohawk*

In *Mohawk*, this Court granted certiorari to consider "[w]hether a defendant corporation and its agents can constitute an 'enterprise,'" *see Mohawk*, 465 F.3d at 1281; *Mohawk Indus., Inc. v. Williams*, 546 U.S. 1075 (2005), but then dismissed the writ of certiorari on that question as improvidently granted and vacated and remanded for consideration in light of the proximate cause holding of *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006). *See Mohawk Indus., Inc. v. Williams*, 547 U.S. 516 (2006). On remand, the Eleventh Circuit reaffirmed its earlier holding that the plaintiffs in the case properly alleged a RICO association-in-fact enterprise comprised of a corporate employer and its

independent-contractor agents who allegedly recruited illegal-alien labor for the company. The Eleventh Circuit deemed these allegations sufficient because the employer and the third-party recruiters were "distinct entities that, at least according to the complaint, [were] engaged in a conspiracy to bring illegal workers into this country for [the employer's] benefit." 465 F.3d at 1284.

Petitioners mistakenly assert that this holding conflicts with the Eighth Circuit's "common purpose" holding. In fact, the Eighth Circuit's decision in this case is entirely consistent with *Mohawk*. Not only did *Mohawk* involve a markedly different factual context from this case—a conspiracy to recruit illegal labor, as opposed to a scheme by a railroad's leasing agent to abuse its position—but the theory of common purpose in *Mohawk* was radically different from, and not nearly as internally inconsistent as, the theory of common purpose offered here. In *Mohawk*, the agents included in the enterprise (recruiters of illegal-alien workers) acted as agents *for purposes of carrying out the alleged illegal scheme*. Thus, whatever divergent purposes they may also have held, both the principal and the agents shared at least one clear common purpose—perpetrating a scheme to hire illegal workers. *See id.* at 1284-85 (finding common purpose because "the members of the enterprise stand to gain sufficient financial benefits from [the employer's] widespread employment and harboring of illegal workers"). Here, in contrast, Viacom allegedly perpetrated a scheme in which the railroads took no part and had no interest—indeed, a scheme in which, according to the petitioners' own complaint, the railroads were "victim[s]." Second Am. Compl. ¶¶ 162-64, 206-08.

It is true that the Eighth Circuit favorably cited *Baker*, a Seventh Circuit decision, also involving an alleged association in fact of an employer and illegal-labor recruiting agents, which the Eleventh Circuit in *Mohawk* described as "in conflict" with its own decision. 465 F.3d at 1285. But *Baker* did not squarely address the common-purpose question; it simply observed in passing, before rejecting the enterprise allegations on other grounds, that "it is not altogether clear how this 'association in fact' has a common purpose." 357 F.3d at 691. In any event, even assuming that *Mohawk* and *Baker* conflict with each other, this case does not implicate the alleged conflict. The Eighth Circuit's holding that there was no legally cognizable common purpose on the facts of this case involves a markedly different factual situation and thus is distinguishable from both the Eleventh Circuit's decision in *Mohawk* and the Seventh Circuit's dicta in *Baker*.

Though petitioners describe *Mohawk* as "consistent with recent decisions" of three circuits, Pet. 11 & n.8, none of the decisions they cite even considers whether or not a common purpose existed. *See Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602, 612 (6th Cir. 2004) (addressing issues of RICO standing and proximate cause); *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1168 (9th Cir. 2002) (addressing issue of RICO standing); *Commercial Cleaning Servs., L.L.C. v. Colin Serv. Sys., Inc.*, 271 F.3d 374, 380-81 (2d Cir. 2001) (addressing issues of RICO standing and proximate cause). At best, then, *Mohawk* is implicated in a shallow split with dicta in one other case on a question that is not presented here and could not be resolved on these facts. *Mohawk* and

Baker do not support petitioners' ill-conceived argument for review.

b. The Eighth Circuit's Decision Also Does Not Conflict with *Orena*

The second case invoked by petitioners, *Orena*, is even farther afield than *Mohawk*. Petitioners claim that the Eighth Circuit's holding would have prevented the prosecution in *Orena*, which held that a mafia family constituted a RICO enterprise even though its members were engaged in an internal control struggle. 32 F.3d at 710. This argument is nonsense.

Orena involved the quintessential RICO enterprise: a mafia family. Whatever their differences, the Mafiosi identified as enterprise members in *Orena* indisputably shared the common purpose of advancing the enterprise's criminal activities. Indeed, as the Second Circuit explained, the alleged divergence of interests in that case—a struggle for control within the family—reinforced the conclusion that the group formed an enterprise, for it showed that there was a cohesive entity to be controlled. *Id.* In contrast, as the Eighth Circuit held based on its review of the factual record, there was no common purpose in this case; hence, the divergent purposes of the members only highlighted the absence of common purpose. Accordingly, this case has no bearing on *Orena* and will have no impact on similar prosecutions.

C. This Case Is a Poor Vehicle for Reviewing the Common Purpose Issue

In any event, this case is not a sound vehicle for review of the Eighth Circuit's common-purpose holding, as there are at least four alternative

justifications for the Eighth Circuit's decision dismissing the RICO claims against Viacom.

First, these claims fail regardless of the presence or absence of "common purpose" because petitioners presented insufficient evidence of a RICO "pattern." *See supra* at 13; *infra* at 22-25.

Second, according to petitioners' own complaint, the railroads included in the alleged association-in-fact enterprises were "victim[s]" of Viacom's alleged fraudulent scheme. Second Am. Compl. ¶¶ 162-64, 206-08. As the district court recognized, an association-in-fact RICO enterprise cannot, as a matter of law, include even "innocent participants," let alone victims. Pet. App. 54a.

Third, since Viacom was the sole perpetrator of the alleged fraudulent scheme here, petitioners' inclusion of the railroads in the alleged association-in-fact enterprises reflects a transparent effort to circumvent the settled rule that the same entity cannot serve as both RICO defendant and enterprise. *See, e.g., Atlas Pile Driving Co. v. DiCon Fin. Co.*, 886 F.2d 986, 995 (8th Cir. 1989) ("the person named as the defendant cannot also be the entity identified as the enterprise").

Finally, RICO's plain text does not permit the inclusion of corporate entities in an association-in-fact enterprise. Again, the statute defines the term "enterprise" to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). The first clause of the definition thus distinguishes between "individual[s]" and "corporation[s]," and the second clause limits association-in-fact enterprises to

"individuals." Accordingly, at oral argument in *Mohawk*—in which the Court initially granted a writ of certiorari to consider this question—a majority of the justices expressed skepticism about the inclusion of corporations in an association-in-fact enterprise. *See* Tr. of Oral Argument at 29-32, 44-45, *Mohawk*, 547 U.S. 516 (No. 05-465) ("[I]t does seem kind of strange to encompass [corporations] under the term individuals when the same statute uses individuals and corporations separately." (statement of Roberts, C.J.)). Nevertheless, petitioners here have alleged RICO association-in-fact enterprises composed solely of corporate entities (Viacom and the railroads).

For all these reasons, petitioners' RICO claims against Viacom must fail regardless of the common-purpose issue on which the Eighth Circuit rested its decision. Thus, quite apart from the fact that petitioners identify no "compelling reason" to grant certiorari and instead merely seek error-correction with respect to a fact-bound and legally correct holding, review of petitioners' first question would be a waste of this Court's limited resources.

II. THE EIGHTH CIRCUIT'S REJECTION OF RICO CLAIMS AGAINST KELLY AND GUSTIN IS ALSO NOT WORTHY OF REVIEW

A. The Eighth Circuit Correctly Applied Settled Law in Concluding that Petitioners Presented Insufficient Evidence of a RICO Pattern

The Eighth Circuit's rejection of the RICO claims against the individual Viacom employees Kelly and Gustin is equally unworthy of this Court's review. With respect to these claims, the Eighth Circuit held, based on a correct application of settled legal

standards, that petitioners presented insufficient evidence of a "pattern of racketeering activity"—another essential element of a RICO claim. *See* 18 U.S.C. § 1962(c); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985).

Although petitioners based their RICO claims against Kelly and Gustin on an alleged pattern of mail and wire fraud, petitioners made no allegation, and presented no evidence, that they relied on any misrepresentation personally made by Kelly or Gustin. Second Am. Compl. ¶¶ 141-42; Trial Tr. 180-81, 783-84, 1352-53. Nevertheless, the Eighth Circuit "assum[ed] for the sake of argument that Kelly and Gustin engaged in the predicate acts of mail and wire fraud as alleged." Pet. App. 43a. As the court explained: "Even if we assume that [petitioners'] evidence was adequate to support the jury's conclusion that Kelly and Gustin committed the necessary predicate acts of mail fraud and wire fraud, we hold that the evidence was insufficient to support the jury's conclusion that Kelly and Gustin engaged in a pattern of racketeering activity as is also necessary for RICO liability." *Id.*

Under longstanding precedent of this Court, a RICO "pattern" requires a showing of "continuity," that is, a showing that the predicate crimes included in the alleged pattern either took place within a "closed period of repeated conduct" (so-called "closed-ended continuity") or amounted to "past conduct that by its nature projects into the future with a threat of repetition" (so-called "open-ended continuity"). *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 241 (1989). Here, the Eighth Circuit applied *H.J. Inc.*'s holding to the particular facts of this case and correctly

determined that, because Viacom terminated the alleged pattern of racketeering acts and thus removed any threat of repetition, the evidence did not, as a matter of law, establish open-ended continuity, the only type that petitioners attempted to prove. Pet. App. 44a-45a. Petitioners do not claim that the Eighth Circuit misstated *H.J. Inc.*'s holding; they disagree only with the court's entirely correct application of that holding. Such a fact-bound claim that the Eighth Circuit "misappli[ed] . . . a properly stated rule of law" is not worthy of this Court's attention. Sup. Ct. R. 10.

As the Eighth Circuit explained, petitioners' theory of liability was that Kelly and Gustin "devised and perpetrated a scheme by which Viacom would profess to follow a first-come, first-served procedure . . . but would secretly review railroad billboard site applications with the goal of appropriating desired sites for its own use." Pet. App. 44a. This alleged scheme necessarily terminated in January 2003 because at that point Viacom began transmitting a form letter advising all applicants that approval of proposed billboard sites would be "given or denied at the sole discretion" of Viacom and that any action undertaken by the applicant prior to Viacom's approval was "taken at [the applicant's] sole risk and expense." *Id.* at 44a-45a, 72a-73a.

The Eighth Circuit correctly recognized that, after receiving the January 2003 letter, no applicant could claim that it believed licenses would simply be awarded on a first-come, first-served basis. "[B]y expressly notifying site applicants that Viacom would review all applications for billboard licenses and rule on each application in its discretion," "Viacom

effectively terminated any allegedly fraudulent scheme Kelly and Gustin conducted." *Id.* at 45a. In addition, "there was no evidence that the review process would continue to be concealed or misrepresented by Kelly, Gustin, or any other Viacom employee in the future." *Id.* Hence, the record evidence was insufficient as a matter of law to establish the required showing of continuity as to Kelly and Gustin. *Id.*

The evidence discussed by the Eighth Circuit manifestly supports its conclusion, and in any event the Eighth Circuit's decision was nothing more than the application of settled law (the continuity standard) to particular facts. This issue does not satisfy this Court's criteria for review.

B. Petitioners' Arguments for Review Are Meritless

1. Attempting to justify review of the Eighth Circuit's fact-bound pattern holding, petitioners assert that the Eighth Circuit "usurp[ed] . . . the jury's role" by deeming the evidence of continuity insufficient even though the January 2003 letter had been presented to the jury. Pet. 19-23. This is just another way of saying that petitioners disagree with the Eighth Circuit's conclusion that, under *H.J. Inc.*, the evidence was legally insufficient to support the jury's verdict. In fact, the Eighth Circuit properly fulfilled its role in reviewing the legal sufficiency of the evidence under Federal Rule of Civil Procedure 50.

2. Just as petitioners misstate the Eighth Circuit's enterprise holding in an unjustified effort to obtain Supreme Court review, *see supra* at 14-16, so,

too, do they mischaracterize the court's pattern holding.

First, petitioners incorrectly assert that the Eighth Circuit "narrow[ed]" RICO and "commandeer[ed] the jury's fact-finding role" in violation of this Court's "clear instruction that RICO must not be limited based on judicial policy concerns." Pet. 24 (citing *Bridge*, 128 S. Ct. at 2145). Petitioners base this fanciful suggestion on the Eighth Circuit's passing observation that "[w]e have in the past rejected attempts to convert ordinary civil disputes into RICO cases." Pet. App. 45a (citing *Terry A. Lambert Plumbing, Inc. v. W. Sec. Bank*, 934 F.2d 976, 981 (8th Cir. 1991)). But this statement is unremarkable and indisputably correct: even petitioners must recognize that RICO has distinct requirements (e.g., the pattern and enterprise elements) from other civil causes of action. Furthermore, as the Eighth Circuit made clear in the very next sentence of its opinion, the court did not hold that petitioners' evidence was insufficient *because* this was an "ordinary civil dispute[]." It held, rather, that "[a]lthough Plaintiffs have presented evidence sufficient to establish violations of state law, they have not presented sufficient evidence to satisfy the more onerous requirements of RICO." *Id.*

Second, petitioners claim incorrectly that the Eighth Circuit's RICO pattern holding contradicts its ruling on the common-law fraud claims. Pet. 19. In fact, these two holdings by the Eighth Circuit were consistent because they addressed distinct issues. As this Court explained in *Bridge*, common-law fraud and RICO predicate acts of mail and wire fraud are distinct types of claims; they do not carry identical

requirements. 128 S. Ct. at 2141-42. Here, while the common-law claims were based on particular acts of alleged fraud, the RICO claims advanced by petitioners required an ongoing scheme to defraud. With respect to the common-law fraud claims, the Eighth Circuit deemed the evidence sufficient under Missouri and Connecticut law based on testimony that corporate employees misled petitioners Patriot Outdoor, Midwest Outdoor, and Craig Outdoor—all of whom applied for sites before January 2003—about how Viacom processed applications. Pet. App. 8a-12a. In contrast, with respect to the RICO claims, the Eighth Circuit held that petitioners failed to establish the continuity requirement as to Kelly and Gustin because any alleged scheme to defraud was terminated in January 2003 when Viacom began informing applicants that Viacom would review and approve or reject applications in its sole discretion.

3. Finally, petitioners accuse the Eighth Circuit of "rebellion," "open defiance of controlling authority," "breed[ing] contempt for the rule of law," and even rendering this Court's precedents "dead letters." Pet. 19, 23, 25. These hyperbolic declamations are utterly baseless. Petitioners identify no case—from this Court or any other court—that reaches a conflicting result on similar facts. Instead, they assert merely that the Eighth Circuit's decision violates this Court's general instruction in *Bridge* that courts should not limit RICO suits as a matter of policy based on "a preconceived notion of what Congress intended to proscribe." 128 S. Ct. at 2145. As explained, the Eighth Circuit imposed no new limitation on RICO suits; it simply applied settled standards for a RICO pattern to the facts of this case and concluded that petitioners' evidence fell short.

III. THE EIGHTH CIRCUIT'S HOLDING THAT PETITIONER MASSOOD LACKS STANDING IS NOT WORTHY OF REVIEW

A. The Eighth Circuit Correctly Applied Settled Principles of Shareholder Standing to the Facts of This Case

Petitioners' last question presented seeks review of the Eighth Circuit's holding that petitioner Curtis Massood lacks standing to sue individually, as opposed to derivatively, for losses due to Viacom's alleged fraudulent denial of Wilson-Curtis's billboard applications. There is no "compelling reason[]" consistent with this Court's standards to review this question. Sup. Ct. R. 10.

As the Eighth Circuit observed, Massood "apparently knew about Viacom's alleged appropriation of the three Wilson-Curtis billboard sites roughly six months before he sold his Wilson-Curtis shares to Viacom" (when he was already speaking with lawyers about his case). Pet. App. 49a-50a n.11; Trial Tr. 1652. Nevertheless, Massood did not attempt to bring a derivative suit before selling the company. Instead, Massood sued, first in state court and then (after his state claims were dismissed) in this litigation, for damages based on the alleged loss in value to his shares in Wilson-Curtis.

As the Eighth Circuit recognized, "[a] shareholder generally may not sue on his own behalf—under Missouri law or RICO—to recover the wrongful diminution in value of his stock or to recoup his share of money taken from the corporation; such claims must generally be pursued in a shareholders derivative action." Pet. App. 35a (citing cases). While Massood urged the court to recognize an

equitable exception to this general rule here, the Eighth Circuit properly declined to do so; it noted that other courts have likewise "refused to extend a derivative-standing exception" in "analogous situations." *Id.* at 37a. *See, e.g.*, *Lakonia Mgmt. Ltd. v. Meriwether*, 106 F. Supp. 2d 540, 550-51 (S.D.N.Y. 2000) (holding that shareholder could bring RICO claims based on diminution in stock value only as derivative suit); *Warren v. Mercantile Bank of St. Louis, N.A.*, 11 S.W.3d 621, 622 (Mo. Ct. App. 1999) (applying general rule that "[a] shareholder is without standing to sue in his individual capacity for damages to the corporation"); *Small v. Sussman*, 713 N.E.2d 1216, 1220-21 (Ill. App. Ct. 1999) (holding that only derivative suit is possible where "all shareholders are injured uniformly"); *Rand v. Anaconda-Ericsson, Inc.*, 794 F.2d 843, 849 (2d Cir. 1986) (holding that shareholders lacked standing to sue under RICO based on diminution in stock value).

Because the Eighth Circuit's decision is correct under governing precedent, and because in any event the Eighth Circuit's holding was nothing more than the fact-bound application of a settled general rule of shareholder standing to particular facts, this issue is unworthy of this Court's attention.

B. Petitioner Massood's Arguments for Review Are Meritless

1. Massood's Standing Theory Is Novel and Unsupported

Petitioner Massood appears to recognize that ordinarily shareholders may sue only derivatively for losses to a corporation. Indeed, he further concedes that as a general rule "an individual only has standing to pursue a derivative suit on behalf of a

corporation if he/she is presently a shareholder in the corporation." Pet. 26. Nonetheless, Massood insists that "equity demands a different rule in the unusual situation" presented here. *Id.* Specifically, Massood claims that, as a matter of equity, he should be able to recover individually for the loss in value to his shares because "the fraudulent activity of the wrongdoer (Viacom) enabled it to buy the corporation (Wilson-Curtis) victimized by its wrongful conduct." *Id.* This argument finds no support in the case law and presents no "compelling reason[]," Sup. Ct. R. 10, for this Court to review it.

To begin with, Massood's argument for equitable standing is novel and unsupported. Though he cites several cases as supposed authority for his position, the Eighth Circuit concluded that these cases in fact hold only that a shareholder "who continued to own shares in the surviving corporation" may "pursue a derivative claim on behalf of [a] corporation that was acquired in [a] merger"; "in none of those cases did the court permit the shareholder to recover individually for derivative claims." Pet. App. 36a (discussing *Blasband v. Rales*, 971 F.2d 1034, 1046 (3d Cir. 1992); *Mendell ex rel. Viacom, Inc. v. Gollust*, 909 F.2d 724, 729 (2d Cir. 1990); *Keyser v. Commonwealth Nat'l Fin. Corp.*, 120 F.R.D. 489, 493 (M.D. Pa. 1988), *superseded by statute as stated in B.T.Z., Inc. v. Grove*, 803 F. Supp. 1019, 1022 (M.D. Pa. 1992); *Miller v. Steinbach*, 268 F. Supp. 255, 268-69 (S.D.N.Y. 1967)). Here, Massood sold his shares in Wilson-Curtis and owns no interest in the surviving corporation, Viacom. Abundant case law supports the Eighth Circuit's denial of standing in this circumstance. *See supra* at 28-29.

Furthermore, contrary to Massood's claims, the equities of this case do not support recognizing an exception to ordinary shareholder standing principles. As the Eighth Circuit observed, Massood "apparently knew about" the alleged wrongdoing some six months before he sold the company to Viacom, yet he proceeded with the sale without attempting to bring a derivative action. Pet. App. 49a-50a n.11. Given that Massood slept on his rights and indeed consented to the situation that he now complains about (ownership of the alleged victim company's stock by the alleged wrongdoer Viacom), Massood's position finds no support in equitable considerations.

Finally, even were Massood correct on the merits—which he is not—that he should be granted equitable standing, res judicata and collateral estoppel would bar the Eighth Circuit from reaching that result, as the Missouri state court rejected nearly identical claims based on lack of standing. *See* Pet. App. 66a. And, in any event, Massood's petition at best seeks error-correction with respect to the Eighth Circuit's application of settled shareholder standing principles to particular facts.

2. Massood's Standing on His Non-RICO Claims Does Not Present a Federal Issue

Review of the Eighth Circuit's standing decision on Massood's non-RICO claims would be inappropriate for yet another reason: shareholder standing on these claims presents a question of state, not federal, law. Massood, of course, suggests otherwise, declaring in his argument heading that this case presents a "substantial question of federal law." Pet. 25. But the very cases he cites make plain that

shareholder standing on state claims depends on state law. *See, e.g.*, *Blasband*, 971 F.2d at 1046 (applying "Delaware's statutory and common law standing requirements"); *cf. Miller*, 268 F. Supp. at 268 (analyzing standing as a matter of federal law rather than state law only because cause of action was federal). Accordingly, the court's ruling on these claims presents no "important federal question" appropriate for this Court to review. Sup. Ct. R. 10.

3. Case Law Does Not Support Massood's Standing on His RICO Claims

As for his RICO claims, Massood concedes that equitable standing "has never been applied to RICO actions." Pet. 27. To quote the district court: "Federal courts have held repeatedly that shareholders of a corporation lack standing as individuals to bring a RICO action for diminution in the value of their stock allegedly caused by racketeering activities conducted against the corporation." Pet. App. 64a (quoting *Miller v. Loucks*, No. 91-C-6539, 1992 WL 329313, at *12 n.5 (N.D. Ill. Nov. 5, 1992)) (internal quotation marks omitted); *see also, e.g.*, *Brennan v. Chestnut*, 973 F.2d 644, 648 (8th Cir. 1992) ("A shareholder may not maintain an action for an injury to a corporation resulting in a diminution in the value of shares under RICO absent a showing of individual and direct injury to the shareholder."); *Lakonia Mgmt.*, 106 F. Supp. 2d at 551 ("a shareholder cannot assert individual standing under RICO where all the shareholders of a corporation have experienced the same injury").

Massood nonetheless argues that this Court should uphold his standing to bring RICO claims because respondents, "through their pattern of racketeering,"

allegedly "improved their competitive position vis-à-vis Massood" in the billboard business, in which Massood alleges he still participates. Pet. 32. This assertion is meritless for multiple reasons.

First, Massood's competitive-injury argument is inconsistent with petitioners' own complaint, which specifically alleged that "Massood seeks to recover the loss he suffered as a result of the lost value in the Wilson-Curtis shares he owned caused by [Viacom's] scheme to reduce the value of Wilson-Curtis." First Am. Compl. ¶ 55. Second, the district court, in granting summary judgment on a RICO claim not at issue here, held based on the record that it was "pure speculation" that respondents' alleged conduct "ma[de] it more difficult for [petitioners] to compete with [Viacom]." Pet. App. 56a. Third, the cases Massood cites on this issue do not remotely support his competitive-injury standing theory on the facts of this case. *See Maiz v. Virani*, 253 F.3d 641, 655 (11th Cir. 2001) (upholding individual RICO claims where "the majority of the alleged wrongdoing—including the primary wrong . . . —occurred, and the lion's share of the sought-after damages were incurred, well in advance of the chartering of the corporations"); *Wilson v. Askew*, 709 F. Supp. 146, 153 (W.D. Ark. 1989) (holding that loss of fraudulently induced "initial investment" in company was individual injury); *Heart of Am. Grain Inspection Serv., Inc. v. Mo. Dep't of Agric.*, 123 F.3d 1098, 1102 (8th Cir. 1997) (finding individual injury where challenged actions of state agency prevented plaintiffs from practicing their trade). Finally, as explained above in Part II, the Eighth Circuit correctly held that respondents did not in fact engage in a pattern of racketeering activity, so Massood's

RICO claims must fail in any event, regardless of whether he may properly claim standing.

In sum, there is no "compelling reason[]," Sup. Ct. R. 10, to grant a writ of certiorari on this issue or any other issue raised by petitioners.

CONCLUSION

Respondent Viacom respectfully requests that this Court **DENY** the petition for a writ of certiorari in this case.

Respectfully submitted,

GLEN D. NAGER
Counsel of Record
ZACHARY S. PRICE
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939 (phone)
(202) 626-1700 (fax)

SYDNEY MCDOLE
JONES DAY
2727 N. Harwood Street
Dallas, TX 75201-1515
(214) 220-3939 (phone)
(214) 969-5100 (fax)

Counsel for Respondent Viacom Outdoor Inc.

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